



## HUBACHER AMES & TAYLOR, PLLC

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November 22, 2019

Via Electronic Filing

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Re: *Ex parte* notice in *Updating the Commission's Rule for Over-the-Air Reception Devices*, WT Docket No. 19-71.

Dear Ms. Dortch:

On November 21, 2019, representatives of the National Multifamily Housing Council ("NMHC") met with members of the staff of the Wireless Telecommunications Bureau in connection with the docket identified above. The issues discussed at the meeting are described in the attached materials, copies of which were provided to the participants.

The Commission staff who attended were: Garnet Hanly, Erin Boone, and Eli Johnson.

The NMHC representatives at the meeting were: Kevin Donnelly, Vice President, Government Affairs at NMHC; Julianne Goodfellow, Senior Director, Government Affairs at NMHC; and the undersigned.

Very truly yours,

HUBACHER AMES & TAYLOR, P.L.L.C.

Matthew C. Ames

## **THE PROPOSED CHANGES TO THE OTARD RULE EXCEED THE FCC'S STATUTORY AUTHORITY AND WOULD CREATE SIGNIFICANT CONSTITUTIONAL AND PRACTICAL PROBLEMS**

- The NPRM proposes to amend the Over-the-Air Reception Devices rule (the "OTARD Rule") to include fixed wireless hub and relay antennas in the list of covered devices. The NPRM also proposes including fixed wireless providers in the definition of "antenna user," and deleting the term "customer" from the definition of "fixed wireless signal."
- The intentions of the proponents of the changes are not entirely clear. Some commenters suggest that they are only concerned with rooftop access, so they can install hub facilities. Other commenters seem to want to install dual-use equipment inside subscriber premises, so that they can expand their networks using mesh network technology.<sup>1</sup> Both cases raise practical and legal problems.
- To the extent that the amendments would merely preempt local zoning rules, the Real Estate Associations would not necessarily object. The problem is that the OTARD Rule and the changes are much broader in scope. The proposed amendments would extend the Rule to permit any person that has the exclusive right to use property under the terms of a lease to install fixed wireless hub facilities or relay antennas on all leased property without the consent of the property owner. The effects of the amendments and the issues would differ in specific cases, depending on whether the equipment was a rooftop hub facility, or a mesh network device installed at a subscriber's premises.
- The Real Estate Associations oppose the changes because:
  - To the extent that the goal of the proceeding is to ease access to rooftops, the rule changes are not needed, because there is an active, existing market for rooftop space. There is no factual support in the record for the principle that fixed wireless providers are facing undue difficulties in deploying hub facilities.
  - The proposed amendments would grant wireless carriers and any other entity that leases rooftop space the right to install fixed wireless equipment without paying any more in rent or amending any other lease terms. This seems to be an unintended consequence of the proposal, but in any case it will hinder deployment of all kinds of facilities on rooftops for any purpose. There are two reasons for this:
    - Rooftop space is valuable and property owners who grant access (and who bear the expense of managing and maintaining the property) naturally expect to be compensated for that value. Rents will therefore tend to increase -- regardless of the lessee's intended use -- to account for the possibility that the lessee may choose to install a fixed wireless antenna in the future.

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<sup>1</sup> One source of confusion is that providers may already have this right, which makes it difficult to fully understand the intended effects of the proposed changes.

- Property owners of all kinds are very sensitive to activity on rooftops because of the great harm that can be caused to a building through penetration and improper sealing of a roof. If owners cannot control future installations, they will be less inclined to take the risk of granting access.
  - These two concerns will be magnified because thousands of rooftops are already subject to leases, whether to wireless carriers or other types of entities (such as solar panel operators), and owners will be very aware that the Commission has granted new, commercially valuable rights that were never contemplated by the property owner.
- One goal of the change seems to be to promote mesh networks that rely on equipment that serves both the end user and extends the provider's network by relaying signals to other end users. In other words, the mesh network operators seek to extend their network capabilities by using property they do not own, without paying the property owner for that right. This violates a fundamental principle of American law and business: property owners are entitled to compensation for the use of their property.
  - Notwithstanding the Commission's findings in the 2004 *Competitive Networks Order on Reconsideration*, dual use mesh network equipment is not like the satellite dishes and WiFi antennas that are already covered by the OTARD Rule. Nor is it like customer-end fixed wireless receiving equipment, which allows the user to receive and transmit broadband signals only for the user's own needs.
  - Mesh network equipment contains components that are not needed solely to meet the subscriber's needs, but are specifically designed to allow the network operator to relay the signals of other users.
  - In other words, service providers cannot be granted the right to operate, for their own purposes, equipment installed on property in which they themselves have no ownership or leasehold rights. The Supreme Court has held that the Fifth Amendment to the United States Constitution forbids this: The proposed amendments would constitute a *per se* physical taking of property under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).
- Finally, the Commission has no statutory authority to expand the OTARD Rule to protect fixed wireless hub and relay antennas. Congress enacted Section 207 to protect consumers. When the D.C. Circuit held that the Commission could extend the rule to leased property, in *BOMA v. FCC*, 254 F.3d 89 (D.C. Cir. 2001), it did so because the statute applied to "viewers." Consequently, under the statute, the Commission's authority is limited to protecting consumers who are using "customer-end" equipment. The proposed amendments, however, are designed to advance the interests not of viewers or consumers, but of service providers.

# Demand for apartments is outpacing supply.

Creating more apartment homes is the answer to America's housing shortage.

## What's making renting apartments more popular?

**75 MILLION**

adults 18-34 entering the rental market

**60% INCREASE**

in adults 45+ renting in the last decade

**ONLY 20%**

of U.S. households are married couples with kids, reducing demand for traditional homes

**25%**

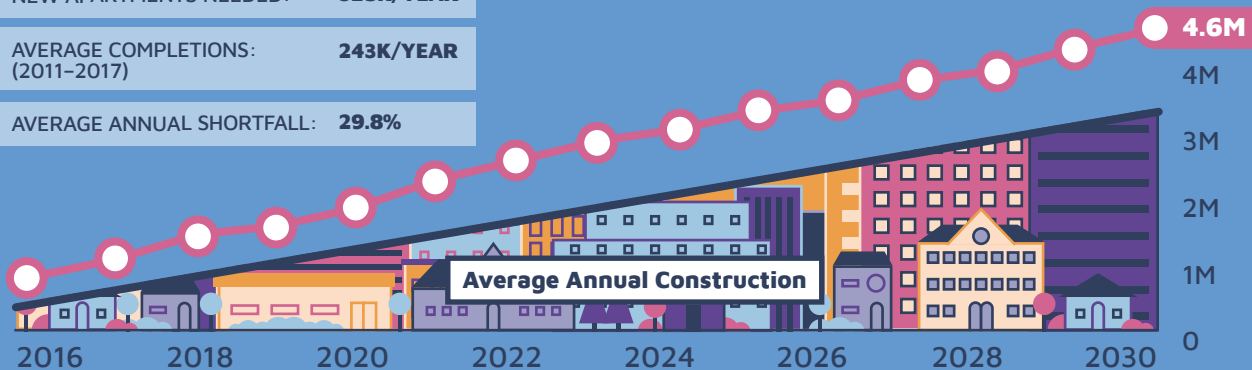
as the U.S. population becomes more diverse, 25% of apartment householders were born outside of the U.S.

## America needs 4.6 million more apartments by 2030.

NEW APARTMENTS NEEDED: **328K/YEAR**

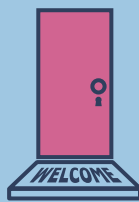
AVERAGE COMPLETIONS: (2011-2017) **243K/YEAR**

AVERAGE ANNUAL SHORTFALL: **29.8%**



## Building more apartments creates jobs and stimulates the economy

**\$1.3 TRILLION**  
to the economy



**39 MILLION**  
Americans call apartments home

**12.3 MILLION JOBS**

We need collaboration between policymakers and the apartment industry to alleviate the housing shortage and help millions of people find home.

Learn more at:  
**WeAreApartments.org**

**NMHC**

NATIONAL  
MULTIFAMILY  
HOUSING  
COUNCIL

**NAA**  
NATIONAL APARTMENT ASSOCIATION

# National

Apartments and their residents contribute **\$3.4T** to the national economy annually, supporting **17.5M** jobs.

## 38.7M

### Apartment Residents

Spending from the country's apartment residents contributes **\$3.0T** to the local economy each year (including **\$350.8B** in taxes), creating **16M** jobs.

## 20.7M

### Apartment Homes

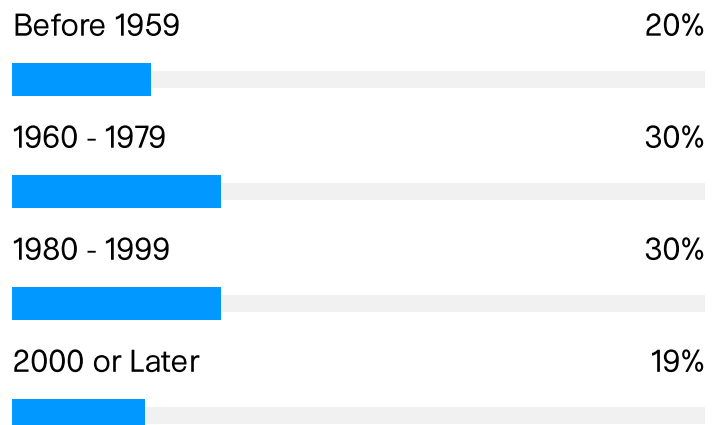
The operation of the country's apartment homes contributes **\$175.2B** to the local economy each year (including **\$58.0B** in property taxes), creating **341K** jobs.

## 50%

### Share of U.S. Apartments Built Before 1980

The renovation and repair of apartments helps preserve the country's older more affordable units, contributing **\$69B** to the local economy annually and creating **340K** jobs.

### Age of Stock



## 328K

### New Apartments Needed Annually

Apartment demand is growing and the industry needs to keep up. However, producing enough new apartments to meet demand requires new development approaches, more incentives and fewer restrictions.

The country needs to build **328K** new apartment homes each year to meet demand. Apartment construction contributes **\$150.1B** to the country's economy annually, creating **752K** jobs.



Source: Hoyt Advisory Services; NMHC/NAA; U.S. Census Bureau